



DEPARTMENT OF EDUCATION

34 CFR Part 226

[DOCKET ID ED-2021-OESE-0147]

RIN 1810-AB62

Charter School Programs (CSP) State Charter School

Facilities Incentive Grants Program

AGENCY: Office of Elementary and Secondary Education,
Department of Education.

ACTION: Final rule.

SUMMARY: The Department of Education (Department) amends
the regulations that govern the State Charter School
Facilities Incentive Program to align the regulations with
the Elementary and Secondary Education Act of 1965 (ESEA),
as amended by the Every Student Succeeds Act (ESSA), and
the Tax Cut and Jobs Act of 2017.

DATES: These regulations are effective [INSERT DATE OF
PUBLICATION IN THE FEDERAL REGISTER].

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(TDD) or text telephone (TTY), call the Federal Relay
Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Department is making technical changes to its regulations in 34 CFR part 226, to align them with the ESEA, as amended by the ESSA. The ESSA, which was signed into law on December 10, 2015, reauthorized the ESEA, previously amended by the No Child Left Behind Act of 2001 (NCLB). We are also making changes to reflect the repeal of the Qualified Zone Academy Bonds (QZAB) under the Tax Cut and Jobs Act of 2017. These final regulations update ESEA citations, remove obsolete references, and make other technical changes in 34 CFR part 226, specifically §§ 226.4(a), 226.11(a), 226.12(d)(3) and (e), 226.13, and 226.14.

This final rule is separate and apart from any notice of proposed priorities, requirements, selection criteria, or definitions that we may publish for the State Charter School Facilities Incentive Program.

Part 226--State Charter School Facilities Incentive Program Statute: Section 4310 of the ESEA.

Current Regulations: Section 226.4(a) specifies the definitions that apply to the State Charter School Facilities Incentive program. Section 226.4(a) states that "charter school" is defined in section 5210 of the ESEA.

New Regulations: In §226.4(a) of these final regulations, we update the citation for the definition of "charter school" to section 4310 of the ESEA.

Reasons: Amendments to the ESEA by the ESSA resulted in a change to the citation for the statute's definition section. The definitions for the program are now in section 4310 of the ESEA, as amended by ESSA.

Statute: Section 5202(e) of the ESEA.

Current Regulations: Section 226.11(a) states that the Secretary evaluates applications, in part, on the basis of competitive preference priorities in §226.13. Section 226.13 provides that the Secretary shall award additional points under the four statutory funding priorities in section 5202(e)(2) and (3)(A), (B), and (C) of the ESEA of.

New Regulations: In §226.11(a) of these final regulations, we remove the reference to §226.13.

Reasons: The ESSA amendments to the ESEA removed section 5202(e) from the statute.

Statute: Section 4304 of the ESEA.

Current Regulations: Section 226.12 establishes the selection criteria that the Secretary uses in evaluating applications for CSP State Charter Schools Facilities Incentive Grants. Under selection criterion (d)(3), the Secretary evaluates the extent to which the applicant's non-Federal share exceeds the minimum percentages of the per-pupil facilities aid program in section 5205(b)(2)(C) of the ESEA.

New Regulations: Section 226.12(d)(3) of these final regulations cites section 4304(k)(2)(C) of the ESEA, as

amended by the ESSA, when referencing the extent to which the non-Federal share exceeds the minimum percentages of the per-pupil facilities aid program.

Reasons: The current citation, section 5205(b)(2)(C), is from the ESEA, as amended by NCLB. In these final regulations, we update the citation in §226.12(d)(3) to section 4304(k)(2)(C) to reference the ESEA, as amended by the ESSA.

Statute: Section 13404 of the Tax Cuts and Jobs Act of 2017.

Current Regulations: Section 226.12 establishes the selection criteria that the Secretary uses in evaluating applications for CSP State Charter Schools Facilities Incentive Grants. Under §226.12(e), the Secretary evaluates the State's experience in addressing the facility needs of charter schools. Specifically, §226.12(e) references experience in using QZABs as an example of how the State could demonstrate experience addressing facility needs of charter schools.

New Regulations: In §226.12(e), we are removing reference to the use of QZABs as an example of how the State could demonstrate experience addressing the facility needs of charter schools.

Reasons: The Tax Cuts and Jobs Act enacted in December 2017 repealed the States' authority to issue tax credit bonds, such as QZABs, after December 31, 2017.

Statute: Section 5202(e) of the ESEA.

Current Regulations: Section 226.13 establishes statutory funding priorities that the Secretary may use in making awards. Specifically, it lists the priorities described in section 5202(e) (2) and (3) (A), (B), and (C) of the ESEA: (a) periodic review and evaluation; (b) number of high-quality charter schools; (c) one authorized public chartering agency other than a local educational agency, or an appeals process; and (d) high degree of autonomy.

New Regulations: We are removing §226.13.

Reasons: The ESSA amendments to the ESEA removed section 5202(e) from the statute.

Statute: Title I, Section 1111 of the ESEA.

Current Regulations: Section 226.14--titled "What other funding priorities may the Secretary use in making a grant award?"--provides that the Secretary may award additional points under competitive preference priorities related to the capacity of charter schools to offer public school choice in those communities with the greatest need based on three factors. The three factors are: (1) The extent to which the applicant would target services to geographic areas in which a large proportion or number of public schools have been identified for improvement, corrective action, or restructuring under title I of the ESEA; (2) The extent to which the applicant would target services to geographic areas in which a large proportion of students

perform poorly on State academic assessments; and (3) The extent to which the applicant would target services to communities with large proportions of low-income students.

New Regulations: We are removing the word "other" from the section title. Additionally, we are revising the first factor, which is defined in §226.14(a)(1), to refer to the extent to which the applicant targets services to geographic areas in which a large portion or number of public schools have been identified for comprehensive support and improvement or targeted support and improvement under Title I of the ESEA, as amended by the ESSA.

Reasons: The ESSA amendments to the ESEA removed the statutory priorities established in section 5202(e), leaving one set of funding priorities; hence the word "other" in the section heading is not needed. The ESSA amendments to the ESEA also revised the categories of schools that States must identify under Title I, section 1111. States no longer identify schools for improvement, corrective action, or restructuring; instead, States identify schools for comprehensive support and improvement or targeted support and improvement.

Waiver of Proposed Rulemaking and Delayed Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations.

However, the APA provides that an agency is not required to

conduct notice and comment rulemaking when the agency, for good cause, finds that the requirement is impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b) (B). There is good cause here for waiving rulemaking because these regulations make technical changes only to align with current law and do not establish substantive policy.

The APA also generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d) (3)). Again, because these final regulations are merely technical, there is good cause to make them effective on the day they are published.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal

governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not significant and, therefore, not subject to review by OMB under Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives

and taking into account--among other things, and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes

that these regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action is not significant and would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action.

Potential Costs and Benefits

The Department believes that this final rule does not impose costs because it makes only technical changes that do not impose additional burden. Moreover, any costs associated with this rule are outweighed by the benefit of providing necessary clarification.

Need for Regulatory Action

The Secretary amends the State Charter School Facilities Incentive Grants program regulations to reflect changes made to the program statute by ESSA. These technical amendments are needed to provide clarity in program administration for prospective applicants and the public.

Net Budget Impacts

The Department estimates that these final regulations will add an additional cost of \$0.

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act does not apply to this rulemaking because there is good cause to waive notice and comment under 5 U.S.C. 553.

Paperwork Reduction Act of 1995

The final regulations do not create any new information collection requirements.

Intergovernmental Review

The State Charter School Facilities Incentive Grants Program is subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Accessible Format: On request to the program contact person listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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List of Subjects in 34 CFR Part 226

Education, Educational facilities, Grant programs-education, Reporting and recordkeeping requirements, Schools.

Miguel A. Cardona,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends part 226 of title 34 of the Code of Federal Regulations as follows:

PART 226—STATE CHARTER SCHOOL FACILITIES INCENTIVE PROGRAM

1. The authority citation for part 226 continues to read as follows:

AUTHORITY: 20 U.S.C. 1221e-3; 7221d(b), unless otherwise noted.

§226.4 [Amended]

2. Section 226.4 is amended in paragraph (a) introductory text by removing "5210" and adding in its place "4310".

§226.11 [Amended]

3. Section 226.11 is amended in paragraph (a) by removing "\$226.13 and".

4. Section 226.12 is amended:

a. In paragraph (d) (3), by removing "5205(b) (2) (C)" and adding, in its place, "4304(k) (2) (C)"; and

b. By revising paragraph (e).

The revision reads as follows:

§226.12 What selection criteria does the Secretary use in evaluating an application for a State Charter School Facilities Incentive program grant?

* * * * *

(e) *State experience.* The experience of the State in addressing the facility needs of charter schools through various means, including providing per-pupil aid and access to State loan or bonding pools.

* * * * *

§226.13 [Removed and Reserved]

5. Section 226.13 is removed and reserved.

§226.14 [Amended]

6. Section 226.14 is amended:

A. In the section heading, by removing "other".

B. In paragraph (a) (1), by removing "improvement, corrective action, or restructuring under title I of the

ESEA" and adding, in its place, "comprehensive support and improvement or targeted support and improvement under the ESEA".

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